Supreme Court, U.S.
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No. 02-1043

In The
Supreme Court of the United States

BOARD OF TRUSTEES OF MANHATTAN BEACH UNIFIED SCHOOL DISTRICT, et al.,

Petitioners,

v.

DASHIEL PORTER, by and through his Guardian ad Litem DEBORAH BLAIR PORTER, JOHN PORTER, an individual and DEBORAH BLAIR PORTER, an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Congress intend to give jurisdiction to the Federal Courts in cases arising under the Individuals With Disabilities Education Act other than for timely filed appeals of state administrative hearing rulings pursuant to 20 U.S.C. § 1415(i)(2)(A)?

2. Is 42 U.S.C. § 1983 available to seek redress for IDEA violations?

LIST OF ALL PARTIES:

Petitioners: Board of Trustees of Manhattan Beach Unified School District; Manhattan Beach Unified School District; Gerald F. Davis, Superintendent of Manhattan Beach Unified School District; Linda Jones, Director of Pupil Personnel Services of Manhattan Beach Unified School District.

Co-Defendants/Appellees: Board of Education of the State of California; California Department of Education; Delaine Eastin, State Superintendent of Public Instruction for the State of California.

Respondents: Dashiel Porter, by and through his Guardian ad Litem Deborah Blair Porter; John Porter, an individual; Deborah Blair Porter, an individual.

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OPINIONS BELOW

The opinion below was filed by the United States Court of Appeals for the Ninth Circuit on October 8, 2002. The Court's opinion in *Porter v. Board of Trustees of Manhattan Beach Unified Schoc! District* is reported at 307 F.3d 1064 (9th Cir. 2002) and is reproduced in the Appendix herein at App. 1-22.

The Federal District Court's opinion was filed on December 12, 2000. The District Court's opinion in *Porter v. Board of Trustees of Manhattan Beach Unified School Dist., et al.*, is reported at 123 F.Supp.2d 1187 (C.D. Cal. 2000), and is reproduced in the Appendix herein at App. 22-52.

STATEMENT OF JURISDICTION

The Ninth Circuit's opinion below was filed on October 8, 2002. Petitioners Board of Trustees of Manhattan Beach Unified School District, et al. seek review in this Court pursuant to Rule 12 of the Rules of the Supreme Court of the United States and 28 U.S.C. § 1254.

STATUTES INVOLVED IN THIS CASE

This case involves the original jurisdiction of the Federal courts to determine issues arising under the *Individuals With Disabilities Education Act* (IDEA). A copy of the procedural safeguards of the statute, 20 U.S.C. § 1415, is set forth in the Appendix at App. 53-83.

In addition, this case involves the extent that 42 U.S.C. § 1983 is available to enforce non-appealed State

administrative rulings in Federal Court. 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

FACTUAL AND PROCEDURAL BACKGROUND

Petitioners herein adopt the factual and procedural background as set forth in the Ninth Circuit Court of Appeals' opinion at App. 7 through 9. That portion of the Ninth Circuit's opinion is reproduced verbatim herein, absent two footnotes not relevant:

> "Dashiel Porter is an autistic child, born in 1987. He was found eligible for special education when he was three years old. On June 30, 1999, responding to a complaint filed by his parents, Deborah and John Porter, California's Special Education Hearing Office ("SEHO") found that Dashiel had significant educational deficiencies resulting from the failure of the Manhattan Beach Unified School District ("MBUSD") to provide Dashiel a free appropriate public education.

Based on this finding, the SEHO ordered the MBUSD and its Board of Trustees (together, "Local Defendants") to provide Dashiel with compensatory education during the 1999-2000 school year.

During the course of the 1999-2000 school year, MBUSD officials held a series of meetings with the Porters, but MBUSD never implemented a full compensatory education program. Instead, the Porters hired a private tutor for Dashiel at their own expense. On August 7, 2000, the Porters filed the complaint initiating this action, listing as defendants: the Local Defendants; Gerald F. Davis, Superintendent of the MBUSD, and Linda M. Jones, Director of Pupil Personnel Services for the MBUSD (together, "Individual Defendants"); and the Board of Education of the State of California, the California Department of Education and Delaine Eastin, Superintendent of Public Instruction (collectively, "State Defendants"). The Porters sought relief, including an injunction and monetary damages, for violations of the IDEA and California law related to the failure of the Local and Individual Defendants to comply with the June 30 SEHO order.

The district court dismissed the Porters' complaint, without prejudice, for lack of jurisdiction because they had not sought to enforce the SEHO order through California's CRP [Complaint Resolution Procedure] before filing suit. Based on Eleventh Amendment immunity, the court dismissed the § 1983 claim with prejudice as to the State and Local Defendants sued in their official capacities. The court determined that, with the dismissal of the IDEA and § 1983 claims, there remained no jurisdictional basis to hear the Porters' state law claims.

> The Porters timely filed this appeal, challenging the dismissal of their IDEA and § 1983 claims with respect to their allegations that the defendants failed to comply with the June 30 SEHO order. Thus, they frame the primary issue in this appeal as whether they were required to exhaust California's CRP before filing an action under the IDEA and § 1983 to enforce a SEHO order that they allege was not fully implemented by the school district. They also challenge the dismissal of their claims against the defendants based on Eleventh Amendment immunity to the extent that they seek injunctive relief." *Porter, id.* at 1067-1068.

The basis for Federal jurisdiction in the Court of first instance was 28 U.S.C. § 1331. Petitioners challenge that the District Court in this matter had jurisdiction to decide any of the issues presented in Respondents' Complaint.

Petitioners further submit that there is a conflict among the Circuits as to the availability of 42 U.S.C. § 1983 to redress IDEA violations. Petitioners submit that statute is unavailable to redress IDEA violations.

ARGUMENT

A. Congress provided jurisdiction in Federal Courts on claims arising under the IDEA only where a party aggrieved by a decision appeals it for modified de novo review.

The Ninth Circuit herein decided, implicitly, that Federal courts have jurisdiction over claims arising under the IDEA, even where the claim was not brought before the District Court pursuant to a timely appeal of a State administrative finding regarding a student's Individualized

Education Plan (IEP.) The Ninth Circuit, in the trial court herein, focused on whether the Porters were required to exhaust State administrative remedies to attempt to enforce an administrative hearing order. In reversing the District Court, the Ninth Circuit held that the IDEA did not require exhaustion of State administrative remedies not provided for in the IDEA itself and, therefore, reversed the District Court's granting of defendants' Motion to Dismiss for lack of jurisdiction.

Petitioners herein submit that both the District Court and the Court of Appeals improperly focused on exhaustion of remedies. Petitioners submit that an important question of Federal law has not been, but should be, settled by this Court.

Namely, whether a Federal Court has any jurisdiction under the IDEA to decide any issue regarding a child's educational placement, absent a timely filed appeal of the State administrative hearing officer's decision, pursuant to 20 U.S.C. § 1415(i)(2)(A). Petitioners submit that Congress intended to provide jurisdiction to Federal courts only on appeals of State hearing officer's decisions regarding a student's IEP. A conflict exists among the Circuits as to the availability of 42 U.S.C. § 1983 to redress violations of the IDEA and resolution is sought as to that issue.

This Court in *Board of Education of the Hendrick Hudson Central School District Bd. of Ed., Westchester County v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) recognized that "the act permits '[a]ny *party aggrieved* by the findings and decision' of the State administrative hearings 'to bring a civil action' in 'any State court of competent jurisdiction or in a district court of the United States without regard to the amount in

controversy.' § 1415(e)(2). The complaint, and therefore the civil action, may concern 'any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.' § 1415(b)(1)(E)." *Rowley, ibid.* at 204-205, 102 S. Ct. 3050. [Emphasis added.]

The Court went on to note that the District Court would receive the record of the State administrative hearings, hear additional evidence, and base its decision upon the preponderance of the evidence. *Rowley, ibid.* at 205, 102 S. Ct. 3050.

This Court concluded:

> "Therefore, a Court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the state complied with the procedures set forth in the act? [Footnote omitted.] And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? [Footnote omitted.] If these requirements are met, the state has complied with the obligations imposed by Congress and the Courts can require no more." *Rowley, ibid.* at 206-207, 102 S. Ct. 3051.

Finally, the Court noted that courts should exercise deference to the State's own theories regarding choice of appropriate education in proceedings conducted under the Act, noting that District Courts lack the specialized knowledge and experience to resolve difficult questions of educational policy.

> "We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education,

> but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." *Rowley, ibid.* at 208, 102 S. Ct. 3052.

Several Courts have ruled that Federal Court jurisdiction under the Act is *only* provided to a party *aggrieved by the findings and decisions* made by the State administrative hearing officer. If a party is not aggrieved by the decision, and does not timely file an appeal of the decision to the Federal District Court, the Federal Court lacks jurisdiction. See e.g. *Metropolitan School Dist. of Martinsville v. Buskirk,* 950 F.Supp. 899, 902 (S.D. Ind. 1997).

As the District Court's decision herein made clear, neither the Porters nor Manhattan Beach Unified School District et al. were aggrieved by the hearing officer's decision. Neither party filed a timely appeal of that decision. Petitioners submit that, therefore, the Federal court lacked subject matter jurisdiction over the entirety of the Porters' Complaint. Not only is Petitioners' position supported by the language of the statute itself, as well as the case law set forth above, but the policy noted by the Court in the *Rowley* opinion, supra, would be vindicated. Federal Courts, non-experts on educational philosophy, will provide a "modified de novo review" of the State administrative hearing officer's decision. District Courts would then be in the position envisioned by Congress; simply providing oversight review of timely appealed State hearings.

The Ninth Circuit's opinion in this case implicitly requires Federal District Courts to review each and every aspect of alleged compliance or failure to comply with the State hearing officer's ruling. Under the Ninth Circuit

opinion, *any* disagreement or alleged disagreement regarding compliance by the student and parents, or by the school district, with the administrative hearing officer's decision, provides jurisdiction in the Federal courts to adjudicate these issues. Petitioners submit Congress could not possibly have intended for the Federal courts to be vested with jurisdiction to monitor every issue of disagreement regarding compliance with a student's IEP.

Petitioners submit their position is supported by the "modified de novo review" standard which has developed in the field of IDEA actions. In *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887-888 (9th Cir. 2001), the Court held that a modified de novo review in the Federal court, giving deference to the State administrative law judge's findings of facts and conclusions, is the appropriate standard for review by Federal courts of the State administrative agencies regarding a student's IEP. See also, *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 624 (6th Cir. 1990); *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997).

Petitioners submit that, under the Ninth Circuit's opinion, there is no administrative record for the District Court to review. Rather, the parties will be before the Court without a clear administrative record for modified de novo review, thereby requiring the District Court to become what Congress and this Court have explicitly stated the IDEA does not contemplate: an expert in educational theory and philosophy. Petitioners submit that the District Court herein erred only in dismissing the Complaint on the grounds that the Porters needed to "exhaust" further administrative remedies *before* proceeding in Federal District Court. Petitioners submit that the District Court correctly dismissed the case for lack of subject matter jurisdiction *on the grounds that the Porters were not*

aggrieved parties as defined by the statute, and did not timely appeal the State hearing officer's decision.

Regulations promulgated pursuant to the IDEA require participating States to establish not only due process hearings, but compliance procedures as well. See 34 C.F.R. §§ 300–660-662. California has promulgated regulations in accordance with the IDEA's requirements. Section 4650 of Title V, Division 1, of California, *Code of Regulations* provides for procedures to compel compliance with the State's administrative orders regarding an IEP. California law further provides for Petitions for Writ of Mandate to State courts to compel compliance with orders of State administrative agencies. (California, *Code of Civil Procedure*, § 1094.5.)

Petitioners request guidance from this Court regarding the extent of the jurisdiction provided to Federal courts by the IDEA. Petitioners submit that the Federal courts have jurisdiction over timely filed appeals of State administrative hearing orders where a party is aggrieved by the order. Absent a timely appeal, the Federal courts do not have jurisdiction over any issue regarding a final administrative hearing order.

B. Congressional reaction to this Court's holding in *Smith v. Robinson* does not preclude this Court from ruling that Federal courts have jurisdiction over claims arising under the IDEA only where a timely appeal by an aggrieved party has been brought before the District Court.

This Court ruled in *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984), that the comprehensive nature of the IDEA evidenced Congress' intent in

passing the law to displace all other remedies available to handicapped students against the school district of participating States. *Smith, ibid.,* at 1009, 104 S. Ct. 3467. In response, Congress amended the IDEA to add § 1415(l) [formerly Section 1415 (f)] which holds:

> "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter."

However, § 1415 (l) still requires that a plaintiff in Federal court whose claims under the *Americans With Disabilities Act* (ADA) or Title V of the *Rehabilitation Act of 1973* (Title V) exhaust the administrative remedies of the IDEA where there is an overlap in the relief sought. In other words, any student alleging discrimination based on handicapped status involving educational issues is required to exhaust the IDEA's administrative remedies before filing suit in Federal court.

Petitioners submit that Congress' intent in requiring exhaustion of the administrative remedies was to continue to limit the Federal court's jurisdiction in disputes regarding a student's IEP *to timely filed appeals of the State administrative hearing officer's decision.* If there is no overlap between claims under the ADA or Title V, the

plaintiff need not exhaust the IDEA's administrative remedies. However, if there is any overlap, exhaustion is required and, Petitioners submit, the District Court only has jurisdiction over the claims presented under the IDEA to the extent a timely filed appeal by an aggrieved party has been filed in the Federal court.

C. 42 U.S.C. § 1983 should not be available to enforce actions under the IDEA.

Currently, there is a dispute among the Districts regarding the availability of 42 U.S.C. § 1983 to vindicate rights pursuant to the IDEA. The Fourth Circuit and the Tenth Circuit have ruled that § 1983 does not provide a remedy for violations under the IDEA. The Third and Seventh Circuits have ruled that § 1983 is available to enforce the IDEA.

The Tenth Circuit in *Padilla v. School District #1 in the City and County of Denver, Colorado,* 233 F.3d 1268 (10th Cir. 2000) held that the Congressional Amendments in response to *Smith* did not provide a right of action under 42 U.S.C. § 1983:

> "It is well settled that 1983 is 'a generally and presumptively available remedy for claimed violations of federal law.' *Livadas v. Bradshaw,* 512 U.S. 107, 133, 114 S. Ct. 2068, [129 L. Ed. 2d 93] (1994). Nonetheless, Congress can foreclose recourse to § 1983 'either by express words or by providing a comprehensive alternative enforcement scheme.' *Id.;* see also *Blessing v. Freestone,* 520 U.S. 329, 341, 117 S. Ct. 1353 [137 L. Ed. 2d 569] (1997). Congress has not expressly prohibited § 1983 suits as remedies for IDEA violations, so we must turn to the question of whether the

IDEA's administrative remedies nevertheless imply congressional intent to do so. Supreme Court precedent guides our inquiry.

In *Smith v. Robinson*, 468 U.S. 992, 104 S. Ct. 3457 82 L. Ed. 2d 746 (1984), the Supreme Court considered whether the plaintiffs could pursue 'virtually identical' claims for a free appropriate education under the EHA (IDEA's predecessor), the Rehabilitation Act, and § 1983 (based on alleged Equal Protection and Due Process deprivations). *Id.*, at 1009, 104 S. Ct. 3457. The Court concluded that the EHA's thorough enforcement mechanisms indicated Congress' intent to proscribe such a course of action. *See id.*, at 1012-13, 1018, 104 S. Ct. 3457. For example, as to the plaintiffs' § 1983 claim based on the Equal Protection Clause, the Court stated that

'where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.'

Id. at 1013, 104 S. Ct. 3457. *Smith* did not specifically involve the question of whether the EHA precludes § 1983 suits based on EHA violations. In fact, the Court expressly recognized that the plaintiffs' § 1983 claims alleged constitutional violations, not EHA violations. *See id.*, at 1008-09, 104 S. Ct. 3457. Nonetheless, the Court's holding that the EHA provided a comprehensive enforcement scheme that preempted other overlapping but independent statutory or constitutional claims

necessarily meant that the EHA also supplanted § 1983 claims based simply on EHA violations.

In response to *Smith,* Congress amended the EHA in 1986. *See* Pub. L. No. 99-372, 100 Stat. 796 (1986); S. Rep. No. 99-112, at 2 (1985), reprinted in 1986 U.S.C.C.A.N. 1798, 1799. Among other provisions, Congress added § 1415(f), which stated in pertinent part: 'Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, Title V of the *Rehabilitation Act* of 1973, of other Federal statutes protecting the rights of handicapped children and youth.' This provision obviously voided *Smith*'s broad holding that the EHA precludes overlapping but independent claims otherwise cognizable under the Constitution, the Rehabilitation Act, or other Federal laws. *See Hayes v. Unified Sch. Dist. No.* 377, 877 F.2d 809, 812 (10th Cir. 1989) ('Congress' amendment of the EHA makes clear that the EHA is not the exclusive remedy available to handicapped students seeking public educational benefits.') H.R. Rep. No. 99-296, at 6 (1985) (stating that § 1415(f) is intended to reaffirm 'the viability of section 504 [of the Rehabilitation Act] and other federal statutes such as 42 U.S.C. 1983 as separate from but equally viable with the EHA as vehicles for securing the rights of handicapped children and youth'). It is less obvious, however, whether Congress intended § 1415(f) to also overrule *Smith's* more narrow implication that the EHA provides a comprehensive remedial framework that forecloses recourse to § 1983 as a remedy for strictly EHA violations. This difficult question has created a split in the circuits. Compare, *e.g., Marie O. v. Edgar,* 131 F.3d 610, 622 (7th Cir. 1997) ('§ 1415(f) was enacted for the express

purpose of ensuring that § 1983 claims would be available to enforce the IDEA.'), and *W.B. v. Matula*, 67 F.3d 484, 494 (3d Cir. 1995) (same), with *Seller v. Sch. Bd.*, 141 F.3d 524, 530-32 (4th Cir. 1998) (stating that § 1415(f) does not allow plaintiffs to sue under § 1983 for an IDEA violation and that § 1415 does not overrule *Smith* on that point).

We agree with the Fourth Circuit that § 1415(f) left intact *Smith's* implication that the EHA may not provide the basis for § 1983 claims. *See Sellers*, 141 F.3d at 529-30. Post-*Smith* Supreme Court precedent compels this conclusion. Since Congress passed § 1415(f) in 1986, the Court has nevertheless cited *Smith* and the EHA/IDEA on at least two occasions as an example of an exhaustive legislative enforcement scheme that precludes § 1983 causes of action. *See Blessing*, 520 U.S. at 347-48; 117 S. Ct. 1353; *Wright v. City of Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 423-24, 427, 107 S. Ct. 766, 93 L. Ed. 2d 781 (1987). In *Wright*, the Court noted that the EHA itself 'provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy.' 479 U.S. at 427. The *Blessing* Court discussed *Smith* as one of only two cases in which it had 'found a remedial scheme sufficiently comprehensive to supplant § 1983.' 520 U.S. at 347, 117 S. Ct. 1353. Moreover, the Court used the EHA/IDEA in both cases as a benchmark for assessing the comprehensiveness of the remedial scheme provided by the statutes in question. *See id.* at 348, *Wright*, 117 S. Ct. 1353; 479 U.S. at 427, 107 S. Ct. 766. Based on these cases, it appears the Supreme Court considers *Smith* to be alive and well insofar as it asserts that § 1983

may not be used to remedy IDEA violations." *Padilla,* at pp.1272-1274.

The Fourth Circuit in *Sellers v. Sch. Bd.*, 141 F.3d 524 (4th Cir. 1998) stated:

> "If Congress intended section 1415(f) to permit parents to sue under section 1983 for IDEA violations, and thereby overrule *Smith* in that respect, it had to speak with clarity.
>
> Section 1415(f) lacks that clarity. The provision fails to state, or even imply, that § 1983 suits may be brought for IDEA violations. Instead, it pointedly omits 42 U.S.C. § 1983 from its list of statutes. This omission is significant. Permitting the recovery of general damages through section 1983 for IDEA violations would subject school boards to damages expotentially greater than the tuition reimbursement they currently face under IDEA itself. Section 1415(f)'s vague language surely did not place states on notice of such sweeping and open-ended liability. If we were to permit section 1983 claims like the Sellers' to proceed, we would effectively blindside states with large and unanticipated penalties. Accordingly, we hold that section 1415(f) fails to express unambiguously a congressional intent that IDEA violations also be remedied by section 1983. [Fn. 5 omitted.] In light of the court's holding in *Smith,* § 1415(f)'s effect on that decision, and the spending power concerns implicit in this question of interpretation, we hold that the Sellers cannot sue under section 1983 for alleged IDEA violations. [Fn. 6 omitted.] As a result, we reject their attempts to recover compensatory and punitive damages unavailable in an action directly under IDEA. We note that our conclusion is consistent with at least two other

> circuits that have held compensatory and punitive damages are not available through the alternate route of a section 1983 claim for violations of IDEA. [Citations omitted.]" *Sellers, ibid.* at 532.

The Second and Third Districts have held that Congress' amendment to the IDEA expressed Congressional intent to permit plaintiffs to bring suit pursuant to § 1983 for violations of the IDEA. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 750 (2nd Cir. 1987); *W.B. v. Matula,* 67 F.3d 484, 493-494 (3rd Cir. 1995), holding § 1415(f) envisioned redress by § 1983 actions.

In revising § 1415 of the IDEA, Congress failed to mention 42 U.S.C. § 1983 as a cause of action still available in conjunction with acts under the IDEA. As noted above, allowing Federal courts to have jurisdiction of claims arising under the IDEA by pursuing a 42 U.S.C. § 1983 claim would allow litigants to bypass the comprehensive administrative remedies procedure of the IDEA. Further, even if a § 1983 cause of action were to be allowed only after exhaustion of the IDEA's remedies, the availability of potential compensatory and punitive damages against school districts or their personnel would contravene Congress' intent in passing the IDEA – to assure state's compliance with procedures to ensure the statutory guarantee of a free appropriate public education for all students.

CONCLUSION

Clear guidance is needed from the Supreme Court on the issues presented herein. Specifically, what is the exact

role of the Federal courts in special education law? What are the jurisdictional requirements, and limits, of the Federal courts in reviewing claims arising under the IDEA? Are 42 U.S.C. § 1983 claims for damages appropriate, especially to enforce administrative decisions which have become final? Did Congress intend in its amendment to the IDEA to have Federal courts review student's IEPs under the *Americans With Disabilities Act* or Section 504 of the *Rehabilitation Act* without a concurrent review of a timely appealed administrative law order?

Petitioners respectfully submit that Congress' grant of jurisdiction to the Federal courts to determine issues arising under the IDEA is limited to timely appeals of State administrative hearing office decisions. Further, 42 U.S.C. § 1983 should not be available to plaintiffs to redress alleged violations of the IDEA.

Of all governmental functions, education has traditionally been entrusted to local control. "Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level." 121 Cong. Rec. 19498 (1975) (remarks of Sen. Dole). In enacting the IDEA, Congress sought to assist States in providing better educational systems to disabled students. It did not intend to displace the privacy of States in the field of education.

Given the traditional deference to States in determining educational philosophy, petitioners submit that Congress intended the Federal courts to provide oversight, only, of timely filed appeals pursuant to 20 U.S.C. § 1415.

Petitioners respectfully request that the Court grant certiorari to review this important question of Federal law and to resolve a conflict among the Circuits.

Respectfully submitted,

JOHN W. ALLEN
GARY R. GIBEAUT
NANCY MAHAN-LAMB

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DASHIEL PORTER, by and through his Guardian ad Litem DEBORAH BLAIR PORTER; JOHN PORTER, an individual; DEBORAH BLAIR PORTER, an individual,

Plaintiffs-Appellants,

v.

BOARD OF TRUSTEES OF MANHATTAN BEACH UNIFIED SCHOOL DISTRICT; MANHATTAN BEACH UNIFIED SCHOOL DISTRICT; GERALD F. DAVIS, in his Official Capacity as Superintendent of Manhattan Beach Unified School District; LINDA M. JONES, individually; LINDA M. JONES, in her Official Capacity as Director of Pupil Personnel Services of Manhattan Beach Unified School District; BOARD OF EDUCATION OF THE STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF EDUCATION; DELAINE EASTIN, in her Official Capacity as State Superintendent of Public Instruction for the State of California; GERALD F. DAVIS, individually,

Defendants-Appellees.

No. 01-55032

D.C. No.
CV-00-08402-RSWL

OPINION

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
April 4, 2002 – Pasadena, California

Filed October 8, 2002

Before: Michael Daly Hawkins and Raymond C. Fisher, Circuit Judges, Charles R. Weiner, District Judge.*

Opinion by Judge Fisher

COUNSEL

Steven M. Wyner, Manhattan Beach, California, for the plaintiffs-appellants.

Andrew V. Arczynski, Filarsky & Watt, Ojai, California, for the defendants-appellees Board of Trustees of Manhattan Beach Unified School District and Manhattan Beach Unified School District.

John W. Allen, Gibeaut, Mahan & Briscoe, Los Angeles, California, for the defendants-appellees Linda M. Jones and Gerald F. Davis.

Allan H. Keown, Deputy General Counsel, California Department of Education, Sacramento, California, for the defendants-appellees Board of Education of the State of California, California Department of Education and Delaine Eastin.

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* The Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Mark L. Gross and Seth M. Galanter, United States Department of Justice Civil Rights Division, Washington, D.C., for the amicus United States of America.

OPINION

FISHER, Circuit Judge.

The plaintiffs, a child with a disability and his parents, filed this suit under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, and 42 U.S.C. § 1983. They allege that the failure of the defendants to implement the directives of an order issued as a result of an IDEA due process hearing denied Dashiel Porter a free appropriate public education. The district court dismissed the complaint for want of jurisdiction, ruling that plaintiffs were required to exhaust California's complaint resolution process before suit. We hold that (1) further exhaustion of California's due process procedures enacted to comply with § 1415 of the IDEA would be futile, (2) the plaintiffs were not required to exhaust California's complaint resolution procedure and (3) the district court erred in dismissing the plaintiffs claims for prospective injunctive relief against the state defendants based on Eleventh Amendment immunity.

I.

A. *Statutory and regulatory background.*

In 1975, finding that more than half of the nation's eight million children with disabilities were not receiving appropriate educational services, Congress appropriated federal funds for state special education programs and

made them available on the condition that states implement policies assuring a "free appropriate public education," sometimes referred to as a "FAPE," for all children with disabilities. 20 U.S.C. § 1412(a) (establishing right to a free appropriate public education); *id.* § 1400(c) (congressional findings). Known then as the Education of All Handicapped Children Act ("EHA"), and today named the Individuals with Disabilities Education Act or IDEA, the law "confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." *Honig v. Doe,* 484 U.S. 305, 310 (1988) (citation and footnote omitted); *see also Bd. of Educ. v. Rowley,* 458 U.S. 176, 188-89 (1982) (holding that the EHA established right to public education for students with disabilities that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction").

Among the most important of the IDEA's goals is the protection of "parents' right to be involved in the development of their child's educational plan." *Amanda v. Clark County Sch. Dist.,* 267 F.3d 877, 882 (9th Cir. 2001). Toward this end, participating states are required to establish procedures giving parents "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). After making their complaint, parents are entitled to "an impartial due process hearing." *Id.* § 1415(f). A decision of the due process hearing "shall be final," *id.* § 1415(i)(1)(A), except

that "[a]ny party aggrieved by the findings and decision . . . shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States." *Id.* § 1415(i)(2)(A). These procedures, including the available appeal, must be explained to parents in writing upon the filing of an administrative complaint. *Id.* § 1415(d).

California adopted legislation to comply with IDEA's due process hearing requirements. Cal. Educ. Code §§ 56500-56507. Under state law, a parent may initiate a due process hearing regarding the provision of a free appropriate public education for a child and that hearing will be conducted "at the state level." *Id.* at § 56501(a), (b)(4).[1] The decision of the hearing officer "shall be the final administrative determination and binding on all parties" unless a party "exercis[es] the right to appeal the decision to a court of competent jurisdiction . . . within 90 days of receipt of the hearing decision." *Id.* § 56505(g), (i).

Distinct from the IDEA's due process requirements, the U.S. Department of Education promulgated regulations pursuant to its general rulemaking authority requiring each recipient of federal funds, including funds provided through the IDEA, to put in place a complaint resolution procedure ("CRP"). 34 C.F.R. §§ 300.660-300.662 (citing 20 U.S.C. § 1221e-3 as authority for rules); *Lucht v.*

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[1] California's hearing system is known as a "one tier" system because the initial hearing is conducted by the state education agency. In a "two-tier" hearing system, the initial hearing is conducted by the local education agency, the decision of which either party may appeal to the state education agency. 20 U.S.C. § 1415(g).

Molalla River Sch. Dist., 225 F.3d 1023, 1029 (9th Cir. 2000).[2] The regulations require each state education agency to adopt written procedures for "[r]esolving any complaint" regarding the education of a child with a disability. 34 C.F.R. § 300.660(a). The regulations permit a complaint to be filed with both the CRP and the IDEA due process hearing system, in which case the CRP must await the due process hearing's resolution of overlapping issues, which is then binding in the CRP. *Id.* § 300.661(c). The regulations state further that the CRP must resolve a complaint alleging a public agency's failure to implement a due process decision. *Id.* § 300.661(c)(3). The regulations do not, however, state that a parent must exhaust the CRP to enforce a due process decision in court.

To comply with the Department's regulations regarding the establishment of a CRP, California established "a uniform system of complaint processing for specified programs or activities which receive state or federal funding." Cal. Code Regs. tit. 5, § 4610(a). These regulations authorize the state Superintendent of Public Instruction to investigate and attempt to resolve any complaint alleging a violation of the IDEA, including a complaint that "alleges that the local educational agency . . . fails or refuses to comply with the [IDEA] due process procedures . . . or has failed or refused to implement a due process hearing order." *Id.* § 4650(a)(viii)(B). In such circumstances, the Superintendent shall offer to mediate the dispute and must resolve any remaining issues within 60 days of the receipt of the complaint, absent exceptional

[2] The regulations originated as part of the Education Department General Administrative Regulations ("EDGAR").

circumstances. *Id.* §§ 4660, 4662. Upon determination that a local agency is in violation of federal or state law, including violation of a due process hearing order, "the Superintendent shall notify the local agency of the action he or she will take to effect compliance," and "may use any means authorized by law to effect compliance," including withholding fiscal support and proceeding in a court of competent jurisdiction for an appropriate order compelling compliance. *Id.* § 4670. California's regulations do not state that the CRP process must be exhausted prior to suit under the IDEA and the CRP is not listed in the description of IDEA due process procedures that California provides to parents upon the filing of an administrative complaint.

B. *Factual and procedural background.*

Dashiel Porter is an autistic child, born in 1987. He was found eligible for special education when he was three years old. On June 30, 1999, responding to a complaint filed by his parents, Deborah and John Porter, California's Special Education Hearing Office ("SEHO") found that Dashiel had significant educational deficiencies resulting from the failure of the Manhattan Beach Unified School District ("MBUSD") to provide Dashiel a free appropriate public education. Based on this finding, the SEHO ordered the MBUSD and its Board of Trustees (together, "Local Defendants") to provide Dashiel with compensatory education during the 1999-2000 school year.

During the course of the 1999-2000 school year, MBUSD officials held a series of meetings with the Porters, but MBUSD never implemented a full compensatory education program. Instead, the Porters hired a private

tutor for Dashiel at their own expense. On August 7, 2000, the Porters filed the complaint initiating this action, listing as defendants: the Local Defendants; Gerald F. Davis, Superintendent of the MBUSD, and Linda M. Jones, Director of Pupil Personnel Services for the MBUSD (together, "Individual Defendants"); and the Board of Education of the State of California, the California Department of Education and Delaine Eastin, Superintendent of Public Instruction (collectively, "State Defendants"). The Porters sought relief, including an injunction and monetary damages, for violations of the IDEA and California law related to the failure of the Local and Individual Defendants to comply with the June 30 SEHO order.[3]

The district court dismissed the Porters' complaint, without prejudice, for lack of jurisdiction because they had not sought to enforce the SEHO order through California's CRP before filing suit. Based on Eleventh Amendment immunity, the court dismissed the § 1983 claim with prejudice as to the State and Local Defendants sued in their official capacities. The court determined that, with the dismissal of the IDEA and § 1983 claims, there remained no jurisdictional basis to hear the Porters' state law claims.

The Porters timely filed this appeal, challenging the dismissal of their IDEA and § 1983 claims with respect to their allegations that the defendants failed to comply with the June 30 SEHO order. Thus, they frame the primary issue in this appeal as whether they were required to

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[3] A fuller description of the facts is included in the district court's published opinion, *Porter v. Manhattan Beach Unified Sch. Dist.*, 123 F. Supp. 2d 1187, 1191-92 (C.D.Cal. 2000).

exhaust California's CRP before filing an action under the IDEA and § 1983 to enforce a SEHO order that they allege was not fully implemented by the school district.[4] They also challenge the dismissal of their claims against the defendants based on Eleventh Amendment immunity to the extent that they seek injunctive relief.

II.

We turn first to whether the Porters met the IDEA's administrative exhaustion requirements before filing this suit, answering this question in two parts. First, we examine whether the Porters exhausted California's due process procedures enacted to comply with § 1415 of the IDEA. Cal. Educ.Code §§ 56500-56507. Next, we examine whether the Porters were required to exhaust California's CRP process in addition to exhausting its due process procedures. The application of the IDEA's statutory exhaustion requirement is predominantly a question of law that we review de novo. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992).

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[4] We reject the defendants' contention that this appeal is moot because, concurrent with the Porters' appeal of the district court's order, the Porters filed a complaint with California's CRP, which subsequently ordered the MBUSD to comply with the SEHO order and to take corrective action. According to the Porters, the MBUSD is still not providing the full range of compensatory education services the SEHO order, and now the CRP order, require. Assuming this allegation of fact is true, we cannot dismiss the Porters' complaint as moot.

A.

The IDEA creates a "right, enforceable in federal court, to the free appropriate public education required by the statute." *Smith v. Robinson,* 468 U.S. 992, 1002 n.6, (1984), *superseded by statute on other grounds by* Pub.L. No. 99-372, 100 Stat. 796 (1986); *accord Honig,* 484 U.S. at 310 (describing the right to a free appropriate public education as "an enforceable substantive right"). Before bringing a suit based on a violation of this right, a complainant must normally exhaust the due process hearing procedures required by 20 U.S.C. § 1415.[5] The IDEA's exhaustion requirement applies to suits under "other Federal laws protecting the rights of children with disabilities . . . seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(l). The exhaustion requirement is not, however, a rigid one. *Hoeft*, 967 F.2d at 1302-03. "Courts universally recognize that parents need not exhaust the procedures set forth in 20 U.S.C. § 1415 where resort to the administrative process would be either futile or inadequate." *Id.* at 1303; *see also Honig*, 484 U.S. at 327; *Kerr Ctr. Parents Ass'n v. Charles,* 897 F.2d 1463, 1470 (9th Cir. 1990).

Here, the Porters exhausted California's due process procedure regarding their initial complaint, receiving a

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[5] The IDEA instructs courts to "receive the records of the administrative proceedings"; "hear additional evidence at the request of a party"; and "grant such relief as the court determines is appropriate" based on a preponderance of the evidence. *Id.* § 1415(i)(2)(B). In reviewing the decisions of due process hearings, we defer to their specialized knowledge and experience by giving "due weight" to their findings and conclusions. *Amanda,* 267 F.3d at 888.

SEHO order in their favor.[6] Neither they nor the MBUSD appealed that order to a court of competent jurisdiction. Accordingly, the order was final and binding under the IDEA and state law. 20 U.S.C. § 1415(i)(1)(A); Cal. Educ.Code § 56505(g), (i).

There is no dispute that the IDEA required the implementation of the final decision of the SEHO. *See Robinson v. Pinderhughes,* 810 F.2d 1270, 1274 (4th Cir. 1987) (holding that IDEA's procedural requirements "can only be fairly construed to contemplate that once a final favorable administrative decision has been gained by a plaintiff, the State will carry out that decision although it may have opposed the position of the plaintiff in the administrative proceedings"); *see also Jeremy H. v. Mount Lebanon Sch. Dist.,* 95 F.3d 272, 279 n.13 (3rd Cir. 1996) ("[I]t [would] be curious for Congress to have established section 1415's detailed procedural apparatus solely in order to generate advisory opinions.").[7] It is also clear that it would be futile to bring a complaint to the SEHO alleging the failure to implement a due process hearing order given our decision in *Wyner v. Manhattan Beach Unified Sch. Dist.,* 223 F.3d 1026 (9th Cir. 2000), that the SEHO lacks jurisdiction to enforce its own orders. Thus, we conclude that the Porters' complaint alleges a violation of the IDEA for which further exhaustion of the procedures

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[6] The compliance of California's due process procedure with the IDEA is not at issue in this appeal.

[7] Nor do the parties dispute that the IDEA's right of action provides a proper means to enforce a due process hearing order; therefore we have no occasion to address the holding of *Robinson* that *only* a § 1983 action can be used to enforce that order. 810 F.2d at 1274.

set forth in § 1415 would be futile or inadequate, allowing them to bring their claim directly to court.

B.

Defendants argue that the futility of California's due process procedure for resolving the Porters' complaint does not end the Porters' exhaustion requirements, because the state's CRP is available to enforce the SEHO order. Thus, the defendants argue, the Porters must exhaust that process before bringing a court action.

The district court accepted the defendants' argument, requiring the exhaustion of California's CRP without finding that Congress intended such exhaustion. *Cf. McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Where Congress specifically mandates, exhaustion is required."). It noted our decision in *Wyner* that the SEHO does not have jurisdiction to enforce its own orders but that California's CRP provides an avenue to enforce those decisions. The district court assumed "technically correct," however, the Porters' argument that *Wyner* did not make resort to the CRP obligatory but rather held only "that issues of non-compliance with an SEHO order *may* be brought before the [CRP]." *Porter*, 123 F. Supp. 2d at 1196 (emphasis in original). The district court nonetheless found that exhaustion of the CRP is "preferable" in light of policies that generally favor exhaustion. *Id.*

Although there is some merit in encouraging resort to the CRP to allow California to correct problems before litigation and to further develop administrative records for judicial review, we conclude that the district court erred in basing its exhaustion determination on a policy analysis independent of the IDEA's requirements. If a statute does

not provide for exhaustion of administrative remedies, a district court may require exhaustion in the exercise of its discretion. *Hoeft*, 967 F.2d at 1302. "The IDEA, however, does provide administrative appeal procedures to be pursued before seeking judicial review." *Id.*; *see* 20 U.S.C. § 1415. Where Congress has provided for the exhaustion of administrative procedures, Congress' intent "is of paramount importance . . . because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts." *Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982). Accordingly, our inquiry is not whether general policies favor requiring the exhaustion of California's CRP, but whether requiring such exhaustion would be consistent with IDEA's procedural scheme.

1.

Our starting point is the text of the IDEA. When Congress provides a "detailed exhaustion scheme," courts generally lack discretion to add additional exhaustion requirements to the scheme. *Patsy*, 457 U.S. at 509-511 (holding that detailed exhaustion scheme of the Civil Rights of Institutionalized Persons Act ("CRIPA") "is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases"); *see also Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993) (holding that it would be inconsistent with Congress' intent to require exhaustion of "optional appeals" through state procedures after "an aggrieved party has exhausted all administrative remedies expressly prescribed" by Congress in the Administrative Procedures Act ("APA")).

The exhaustion scheme provided in § 1415 of the IDEA establishes "elaborate and highly specific procedural safeguards," evidencing that "Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley,* 458 U.S. at 205. Like that under the APA or the CRIPA, the IDEA's exhaustion scheme was carefully designed to balance the individual complainant's interest in retaining prompt access to a judicial forum and the countervailing institutional interests favoring exhaustion. *See Hoeft,* 967 F.2d at 1303 (discussing policies served by the IDEA's exhaustion requirement); *cf. McCarthy,* 503 U.S. at 145-149 (describing the balance of interests applicable in exhaustion determinations). Courts therefore may not, consistent with the intent of Congress, impose exhaustion requirements that "merely add additional steps not contemplated in the scheme of the Act." *Antkowiak v. Ambach,* 838 F.2d 635, 641 (2nd Cir. 1988) (holding that state could not conduct *sua sponte* review of unappealed due process hearing order); *Diamond v. McKenzie,* 602 F. Supp. 632, 639 (D.D.C.1985) (holding that state may not "subject children and their parents to an additional step not required by the EHA").

Requiring exhaustion of California's CRP to file suit based on a failure to implement an unappealed administrative order would add an additional step of administrative exhaustion not contemplated by the IDEA. Once a due process hearing issues an order that is not appealed by either party, the IDEA requires that the order be treated as "final." 20 U.S.C. § 1415(i)(1)(A). No other administrative procedures are required to be exhausted. This clear congressional demarcation of an end point to the due

process procedures weighs heavily in our conclusion that Congress did not intend to allow states to add additional exhaustion requirements not identified in the statute.

2.

We are not aware of any court that has held that the IDEA requires exhaustion of a state's CRP in addition to exhaustion of the due process hearing system before filing suit for violations of the IDEA. The Second and Third Circuits have rejected such claims.

In *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987), the Second Circuit rejected the argument by the State of Connecticut that once its CRP apparatus was invoked it must be exhausted prior to commencing a § 1983 action to enforce a right under the IDEA's precursor, the EHA. The court explained:

> Significantly, § 1415(f) does not specify, directly or by incorporating its legislative history, exhaustion of possible CRP remedies. In fact, research has unearthed no statute or regulation that requires exhaustion of CRP remedies prior to commencing a § 1983 action based on alleged EHA violations . . . . Turning to the EHA caselaw, we note that the Supreme Court has never suggested that the CRP need to be invoked or exhausted prior to seeking federal court involvement in construing the EHA pursuant to § 1415.

Id. at 758.

In a more recent case, the Third Circuit refused to require CRP exhaustion under facts very similar to those at issue here. In *Jeremy H.*, the plaintiffs, like the Porters, brought an action under § 1983 and the IDEA to enforce

the decision of a due process hearing that the local education agency refused to implement. 95 F.3d at 274. Like the defendants here, the defendants in *Jeremy H.* argued that the plaintiffs' effort to enforce the decision of the state administrative proceeding must be exhausted through the state's CRP, which had the authority to order compliance with the due process order. *Id.* at 282. The Third Circuit rejected this argument, finding no legal authority under which a court might require CRP exhaustion. *Id.* at 283. "Indeed," remarked the court, "the text of [the CRP regulations], and the various statements made in the Federal Register as they took their present shape, both evince an expectation that invocation of the complaint procedures they establish will be elective, not mandatory." *Id.*[8]

We presume that when Congress amends a statute, it is knowledgeable about judicial decisions interpreting the prior legislation. *United States v. Hunter,* 101 F.3d 82, 85 (9th Cir. 1996). The IDEA was last amended in 1997.

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[8] The court explained:

> The regulation's text provides only that "[a]n organization or individual *may* file a signed written complaint," 34 C.F.R. § 300.662 (emphasis added), not that an organization or individual *must* do so in order to bring a subsequent lawsuit. . . . [T]he 1991 notice of proposed rulemaking proposed adding a requirement (which has since been adopted) that "each State educational agency inform parents and other interested individuals about the availability of procedures in §§ 300.660-300.662." 56 Fed.Reg. 41,266 at 41,270. This language depicts the complaint procedure as "available," but not as obligatory. The explanatory materials accompanying the (second) final rulemaking, similarly, refer to a complainant's "right" to file a complaint, 57 Fed.Reg. 44,794 at 44,851, but not to an obligation to do so.

Id. at n.20.

Individuals with Disabilities Education Act Amendments for 1997, Pub.L. No. 105-17, 111 Stat. 37. Despite the holdings of the Second and Third Circuits that complainants need not exhaust a state's CRP before suit to enforce IDEA rights, including in a suit to enforce a due process hearing order, Congress did not include a CRP exhaustion requirement in these subsequent amendments. Thus, we infer that Congress did not intend a different interpretation of the scheme it enacted in the IDEA.

3.

It is additionally highly relevant that the U.S. Department of Education has never interpreted its CRP regulations as creating a mandatory step before suit alleging an IDEA violation. Because the CRP "is a creature of the [Department's] own regulations, [its] interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)). According to the Department, the CRP is intended to "*allow* [parents and school districts] to resolve differences without resort to more costly and litigious resolution through due process," not to create a mechanism that must be exhausted in addition to the due process system. Assistance to States for the Education of Children With Disabilities, 64 Fed.Reg. 12,406, 12,646 (March 12, 1999) (comment) (emphasis added); *see also* Office of Special Education Programs Memorandum 00-20 (July 17, 2000) ("OSEP Memorandum 00-20") (describing CRP regulations as attempt to provide "a less costly and more efficient mechanism for resolving disputes than the impartial due process hearing system"); *cf. Lucht,* 225 F.3d at 1028-29

(describing CRP regulations). The Department has repeatedly instructed that parents are "not required to use [the CRP] . . . in addition to the due process hearing system." OSEP Memorandum 00-20; *see also* Letter from Office of Special Education Programs to Johnson, 18 Ind. Disab. Educ. L. Rep. 589, 590 (Dec. 4, 1991) (explaining that "[t]he due process and [CRP] procedures are two separate, distinct, or independent remedies"). We can find nothing to counter the argument made by the government as amicus in this case that requiring the exhaustion of CRP procedures to bring an action in court to enforce the order of a due process hearing would be directly contrary to the U.S. Department of Education's reasonable interpretation of its own regulations.

4.

Finally, although we do not question that in appropriate circumstances a district court may have the discretion to stay the proceedings before it pending resolution of a complaint filed with a CRP, requiring exhaustion of California's CRP as a condition to suit would be inconsistent with the IDEA's enforcement scheme. The final step in California's CRP is not, as under the IDEA's due process procedures, the authorization of a lawsuit by a dissatisfied complainant. Under California's CRP, if the local school district refuses to comply with the state's directives, only the Superintendent of Public Instruction is authorized to bring an action to enforce the CRP order. Cal.Code Regs. tit. 5, § 4670. Thus, to require exhaustion of the CRP would transfer the initiative for bringing an enforcement action from the parents of the disabled child to the state. The other enforcement measure available under the CRP – withholding fiscal support from the school, *id.* – is also

dependent on the initiative of the state and is additionally lacking as an adequate remedy under the IDEA because "the fact remains that it would be contrary to plaintiffs' interests to petition for the withholding of . . . funds from the [school district]. Plaintiffs want [the district's] handicapped education program implemented, not dismantled." *Mrs. W.*, 832 F.2d at 758; *accord Hoekstra v. Indep. Sch. Dist.*, 916 F. Supp. 941, 945 (D.Minn.), *aff'd,* 103 F.3d 624 (8th Cir. 1996). Accordingly, in light of the text of the IDEA, the case law interpreting it, the Department's regulations and interpretations of them and the structure of the IDEA's enforcement scheme, we hold that the IDEA does not require exhaustion of California's CRP in addition to exhaustion of its due process procedures.

5.

None of our prior cases discussing a CRP requires a contrary result. In *Hoeft,* we stated that on a case by case basis, district courts may choose to require or to accept exhaustion of the CRP "as a *substitute* for exhausting IDEA procedures in challenges to facially invalid policies." 967 F.2d at 1308 (emphasis added). That statement followed our holding that complainants are not automatically excepted from all exhaustion requirements where they allege a facial violation of the IDEA by a local school district. *Id.* at 1307. We stated that exhaustion is required even though due process hearing officers are not authorized to adjudicate questions of statutory compliance because "administrative exhaustion may be necessary to give the state a reasonable opportunity to investigate and correct such policies." *Id.* In accord with this rationale, we suggested that the filing of a CRP complaint may be sufficient to meet the exhaustion requirement "where the only

purposes served by exhaustion are to notify the state of local noncompliance and to afford it an opportunity to correct the problem." *Id.* at 1308.

Our statement in *Hoeft* that the CRP may serve as a substitute for due process system exhaustion is consistent with the traditional exception to exhaustion requirements based on futility or inadequacy. *See Honig*, 484 U.S. at 327. Where the challenge is to a facially invalid policy, and the state refuses to alter the policy after a CRP complaint, then further exhaustion may be excused because "the administrative body is shown to be biased or has otherwise predetermined the issue before it." *McCarthy,* 503 U.S. at 148. Exhaustion of a CRP may also render the due process hearing futile where all the educational issues are resolved, leaving only issues for which there is no adequate administrative remedy. *See Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275-76 (9th Cir. 1999). Thus, we agree with the statement in *Hoeft* that there may be instances when exhaustion of the CRP may be a *substitute* for exhaustion of the due process hearing. *Cf.* Office of Special Education Programs Memorandum 94-16, 21 Disab. Educ. L. Rep. 85 (March 22, 1994) (describing the CRP regulations as establishing a process that may be used "in lieu of the due process hearing system"). *Hoeft* did not, however, state that a district court may require exhaustion of a CRP *in addition to* exhaustion of the due process hearing procedures.

Neither is our decision in *Wyner* contrary to our holding. In *Wyner* we held that California's SEHO does not have jurisdiction to hear a complaint alleging failure to comply with an order from a prior due process hearing. 223 F.3d at 1029. We explained that California's CRP "was intended to address compliance claims," providing an

administrative remedy for enforcement of a SEHO decision. *Id.* As we have gone to some length to explain, exhaustion of an administrative enforcement mechanism is not required because of its mere existence. Whether an existing procedure must be exhausted turns on an inquiry into congressional intent. We did not need to engage in that inquiry in *Wyner.*

Nor does our statement in *Wyner* that California's CRP regulations "were promulgated to ensure compliance with the IDEA," *id.,* require us to hold that the CRP procedures are part of the due process system that must be exhausted before suit. Our view that the CRP is part of the means by which a state complies with the IDEA comports with that of the U.S. Department of Education, which views its CRP regulations as establishing a process "critical to each State's . . . general supervision responsibilities" under 20 U.S.C. § 1412. OSEP Memorandum 00-20. The state's supervision responsibilities are independent of its responsibilities to establish a due process procedure that must be exhausted before suit. *See* 20 U.S.C. § 1415(f), (i). Nothing in the IDEA or its legislative history requires a complainant to exhaust every procedure established by a state that is consistent with its supervision responsibilities under the IDEA. Only § 1415 procedures are required to be exhausted prior to suit. Because the Porters exhausted California's procedures adopted pursuant to § 1415 to the point of their futility, they were authorized to bring their complaint alleging an IDEA violation directly to court.

III.

The Porters also challenge the district court's dismissal of their claims against the defendants with prejudice based on Eleventh Amendment immunity, to the extent that they seek injunctive relief against officers who acted outside the bounds of their authority. We agree that the district court erred in this regard. "It is well established that the Eleventh Amendment does not bar a federal court from granting prospective injunctive relief against an officer of the state who acts outside the bounds of his authority." *Cerrato v. San Francisco Comty. Coll. Dist.*, 26 F.3d 968, 973 (9th Cir. 1994); *see also Ex parte Young*, 209 U.S. 123, 159-60 (1908).

IV.

We hold that the Porters were not required to exhaust California's CRP before suit. We hold further that the district court erred in dismissing with prejudice the Porters' claims for prospective injunctive relief against the defendants acting outside the bounds of their authority. We therefore reverse the decision of the district court, and remand for further proceedings consistent with this opinion.[9]

REVERSED AND REMANDED.

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[9] Given this resolution, we need not decide the remaining questions raised by the Porters' opening brief.

123 F.Supp.2d 1187

United States District Court,
C.D. California.

Dashiell PORTER, By and Through his Guardian ad Litem, Deborah Blair PORTER; John Porter, an individual; and Deborah Blair Porter, an individual, Plaintiffs,

v.

BOARD OF TRUSTEES OF MANHATTAN BEACH UNIFIED SCHOOL DISTRICT; Manhattan Beach Unified School District; Gerald F. Davis, individually and in his official capacity as Superintendent of Manhattan Beach Unified School District; Linda M. Jones, individually and in her official capacity as Director of Pupil Personnel Services of Manhattan Beach Unified School District; Board of Education of the State of California; California Department of Education; Delaine Eastin, in her official capacity as State Superintendent of Public Instruction for the State of California, Defendants.

No. CV008402RSWL(RNBX).

Dec. 12, 2000.

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Linda A. Cabatic, Marsha A. Bedwell, Michael E. Hersher, Deputy General Counsel, California Department of Education, Sacramento, CA, for defendants California

Department of Education, Delaine Eastin, Superintendent of Public Instruction and State Board of Education.

Gary Robert Gibeaut, John W. Allen, Gibeaut, Mahan & Briscoe, Los Angeles, CA, for defendants Gerald F. Davis and Linda M. Jones.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

LEW, District Judge.

I. INTRODUCTION

In the case pending before this Court, Plaintiffs assert constitutional and statutory claims for the provision of allegedly inadequate education for a disabled minor student. Before the Court are (1) Defendants Manhattan Beach Unified School District and Board of Trustees of Manhattan Beach Unified School District's Motion to Dismiss Plaintiffs' Complaint and (2) Defendants Gerald F. Davis and Linda M. Jones's Motion to Dismiss Plaintiffs' Complaint Pursuant to Rules 12(b)(1), 12(b)(6), and 12(f) of the Federal Rules of Civil Procedure. Defendants Board of Education of the State of California, California Department of Education, and Delaine Eastin have joined in the Motions to Dismiss.

The matter came on for hearing on November 6, 2000, at which time the Court heard oral argument and took the matter under submission. After reviewing all papers filed in support of and in opposition to the Motions and the arguments of counsel, the Court hereby GRANTS Defendants' Motions to Dismiss.

II. PROCEDURAL BACKGROUND

Dashiell Porter ("Student") is a thirteen-year-old autistic student in the defendant school district who was found eligible for special education when he was three years old. He is a plaintiff in this action (represented through his mother, Deborah Blair Porter), along with his parents, Deborah Blair Porter and John Porter (collectively, "Plaintiffs"). Plaintiffs filed this action against the Board of Trustees of Manhattan Beach Unified School District, Manhattan Beach Unified School District ("MBUSD") (together, "Local Defendants"); Gerald F. Davis, Superintendent of MBUSD, and Linda M. Jones, Director of Pupil Personnel Services for MBUSD (together, "Individual Defendants"); and the Board of Education of the State of California, the California Department of Education ("CDE"), and Delaine Eastin (collectively, "State Defendants") to compel Local and Individual Defendants to comply with a written order entered by the California Special Education Hearing Office ("SEHO") on June 30, 1999, and to compel the State Defendants to ensure that the Local Defendants fully comply with the SEHO order.

Plaintiffs obtained the SEHO order after instituting administrative proceedings to force MBUSD to provide Student with compensatory education relating to social and academic areas in which his skills were deficient. The SEHO determined that Student's deficiencies resulted from MBUSD's failure to provide Student a free appropriate public education ("FAPE") during the 1997-1998 school year, as required by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* Based on this finding, the SEHO ordered MBUSD to provide Student the compensatory education described above during the 1999-2000 school year.

Plaintiffs allege that MBUSD failed to provide Student any compensatory education related to his academic deficiencies during the 1999-2000 school year, and continues to refuse to do so despite the requests of Student's parents. Plaintiffs also allege that Student only received compensatory education relating to his social skills deficiencies for approximately half of that school year. In their complaint, Plaintiffs assert four causes of action: (1) 42 U.S.C. § 1983, based on Defendants' violation of the IDEA; (2) violations of the Due Process and Equal Protection Clauses of the California Constitution (Article I, Section 7); (3) a violation of the IDEA, 20 U.S.C. § 1415(i)(2); and (4) a violation of California Education Code section 56000 *et seq.*

Plaintiffs claim they are entitled to various forms of relief. First, Plaintiffs seek to enforce the June 30, 1999, SEHO order against the Local Defendants. Second, they seek reimbursement for the cost of certain educational services for Student that Student's parents felt compelled to obtain as a result of the Local Defendants' failure to provide Student with the SEHO-ordered compensatory education. Third, they request an order directing MBUSD to pay for a year of social skills modeling and instructional services provided by a nonpublic agency. They also seek the appointment of a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure. Finally, Plaintiffs request monetary damages against the Individual Defendants for their willful failure to comply with the SEHO order and their intentional disregard for Student's statutory and constitutional rights.

Local Defendants and Individual Defendants have brought the instant Motions to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6). State Defendants join in these

Motions. Defendants base their Motions on several grounds. First, they argue that this Court lacks subject matter jurisdiction because Plaintiffs are required to exhaust their administrative remedies before filing an original civil action for a violation of the IDEA or any cause of action, such as § 1983, that is based on a claimed violation of the IDEA. Second, they argue that they are immune from suit under the Eleventh Amendment to the United States Constitution. Individual Defendants further argue that they are entitled to qualified immunity, that there is no private right of action under California Education Code section 56000 *et seq.*, and Plaintiffs' claim under Article I, Section 7 of the California Constitution essentially is a claim for failure to educate, for which there is no private right of action under California law. Defendants argue that Plaintiffs have failed to allege sufficient facts to overcome the impediments to suit listed above.

III. FACTUAL BACKGROUND

Student was found eligible for special education when he was three years old based on speech and language deficiencies. Thereafter, in 1991, Student began to receive speech and language therapy and was later placed in a special day class. During his fourth-grade year (1997-1998), Student transitioned from the special day class to a general education classroom. *Complaint* ¶ 17.5. During the 1998-1999 school year, Student remained in a general education classroom and continued to receive speech and language therapy. *Id.* ¶ 17.6. At the beginning of the 1998-1999 school year, however, MBUSD testing revealed that Student had various academic and socialization deficiencies.

On January 4, 1999, Student's parents initiated due process proceedings on Student's behalf with the SEHO pursuant to 20 U.S.C. § 1415 and California Education Code section 56000 *et seq. Complaint,* Exh. A at 4. On June 30, 1999, the SEHO hearing officer issued her written decision. The hearing officer concluded that MBUSD failed to provide Student with a FAPE during the 1997-1998 school year, as well as during the summers of 1997 and 1998, because: (a) MBUSD failed to offer a program reasonably calculated to provide Student with an educational benefit in reading comprehension, listening comprehension, and oral expression; (b) MBUSD failed to provide Student with appropriate support and services; and (c) MBUSD failed to provide Student with appropriate social skills modeling. *Id.* ¶ 18. The hearing officer determined that these "failures constituted significant denials of FAPE which impeded [Student's] progress in academics and socialization." *Id.,* Exh. A at 20.

The hearing officer concluded that because "reimbursement is not available," MBUSD was obligated to provide Student compensatory education for the 1999-2000 school year. The appropriate form of compensatory education was left to the Individualized Education Program ("IEP") team members, including Student's parents because the record before the SEHO hearing officer was not "sufficiently clear to fashion the form of compensatory education that would adequately compensate [Student] for the denials of FAPE." *Id.,* Exh. A at 20.

The hearing officer then ordered MBUSD to convene an IEP meeting within thirty calendar days of the hearing officer's decision (i.e., on or before July 30, 1999) "to determine the appropriate form of compensatory education to which [Student] is entitled for the denials of FAPE

which occurred during summer 1997, summer 1998, and the 1997-98 school year. The compensatory education program shall supplement the program [Student] attends during the 1999-2000 school year." *Id.*, Exh. A at 21. The hearing officer further directed MBUSD:

> As to appropriate forms of compensation, the IEP team shall include social skills instruction and/or modeling, and remedial instruction in areas of academic deficit. The IEP team shall determine the nature of these services and the extent to which they will be necessary to effectuate the purpose of compensating [Student] for the previous denials of FAPE. Additionally, the IEP team shall determine whether it would be more effective to remediate [Student]' s areas of weakness during the school day or during nonschool hours, and shall determine provision of services accordingly.

Id.

Plaintiffs allege that MBUSD failed to hold an IEP team meeting on or before July 30, 1999, and that such meeting was not held until September 13, 1999. *Complaint* ¶ 29. At the meeting, Student's parents presented a typed plan for compensatory education requesting particular educational and administrative services, including a one-on-one aide to assist Student in all academic subjects. *Id.* ¶¶ 30, 30.1. MBUSD did not agree to provide a one-on-one aide to assist Student in any classes. *Id.* ¶ 31. At the meeting, MBUSD proposed certain goals and objectives related to Student's social skills and offered tutoring to address reading and listening comprehension and oral expression deficiencies. *Id.* ¶ 32. Plaintiffs further allege that the meeting adjourned without an agreement as to

the nature and services to be provided to Student as compensatory education. *Id.* ¶ 33.

Later in September, Student's parents submitted a ten-page statement detailing their objections to proposals made by MBUSD at the September meeting; however, Student's parents nonetheless agreed to designated instructional services for social skills and an after-school reading tutorial program, "subject to certain reasonable conditions precedent." *Id.* ¶ 34. Student's parents insisted that the tutor be "'qualified to teach reading, [have] a special education qualified credential and [have] training or experience in teaching children with autism, auditory processing deficits and significant reading comprehension, listening comprehension and oral language deficits' similar to Student's deficits." *Id.* (brackets in original).

On October 11, 1999, Student's father attended another IEP meeting to conduct Student's annual review. At the meeting, Student's father, through his attorney, presented another proposal for compensatory education during the 1999-2000 school year. Plaintiffs allege that MBUSD elected to defer consideration of this proposal until acceptable goals and objectives were developed. *Id.* ¶ 38. Student's father objected to goals and objectives that MBUSD presented at the October 11, 1999, meeting; MBUSD submitted revised goals and objectives to Student's attorney on October 20, 1999. *Id.* ¶ 39. On November 1, 1999, MBUSD submitted speech and language goals and objectives to Student's parents. *Id.* ¶ 40. One week later, Student's parents communicated their objections to MBUSD's proposed academic and speech/language objectives. *Id.* ¶ 41.

Plaintiffs allege that on January 28, 2000, MBUSD began to provide Student with compensatory education related to his socialization deficits. *Id.* ¶ 48. According to Plaintiffs, MBUSD did not and continues to refuse to provide Student compensatory education related to his academic deficiencies. As a result, Student's parents sought private instruction for Student at the cost of $1300 per week[1] in an effort to remediate Student's deficiencies. *Id.* ¶ 50. Student's mother notified MBUSD that Student's parents would seek reimbursement from MBUSD for this instruction. *Id.* ¶ 49.

IV. DISCUSSION

Plaintiffs allege that MBUSD's Board and MBUSD's Superintendent – Defendant Gerald F. Davis – failed to adopt policies, procedures, and practices necessary to ensure that MBUSD complied with SEHO's order; that Defendant Davis failed to adequately supervise the activities of Defendant Jones concerning compliance with the SEHO order; that Davis knowingly failed and refused to direct Jones to comply with SEHO's order; that Jones knowingly failed and refused to comply with SEHO's order; that State Defendants failed to adopt policies, procedures, and practices necessary to ensure that MBUSD complies with written decisions and orders issued by SEHO, including the June 30, 1999, order at issue; and that State Defendants failed to adequately monitor MBUSD's compliance with written decisions and orders issued by SEHO.

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[1] Student receives 20 hours of private instruction per week.

A. Parties' Arguments

In Local Defendants' First Amended Motion to Dismiss,[2] they first argue that this Court lacks subject matter jurisdiction over Plaintiffs' alleged violations of the IDEA because Plaintiffs have failed to allege exhaustion of their available administrative remedies, as required under the IDEA, and because Local Defendants are arms of the state and therefore enjoy Eleventh Amendment immunity from suit. Local Defendants argue that Plaintiffs' claim under § 1983 is also barred because the IDEA provides the exclusive remedy for violations of the IDEA. Local Defendants further argue that Plaintiffs' entire action should be dismissed pursuant to Rule 12(b)(6) because Plaintiffs have failed to plead exhaustion of administrative remedies.

In Individual Defendants' Motion to Dismiss, they first argue that Plaintiffs' complaint fails to state facts sufficient to sustain a claim against Davis and Jones for a violation of § 1983. They assert that they are entitled to qualified immunity for suits against them in their individual capacities. They also argue that Plaintiffs' claim under the California Constitution essentially alleges a failure to educate, and that under California law, there is no private right of action for "failure to educate" against a public school district. Individual Defendants further argue that Plaintiffs cannot state a claim under California Education Code section 56000 *et seq.* because no private right of

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[2] Local Defendants submitted a "First Amended Notice of Motion and First Amended Motion to Dismiss" because the Table of Contents and Table of Authorities were inadvertently omitted from the original Motion.

action exists for a violation of this section. Individual Defendants also argue that pursuant to Rule 12(f), the Court should strike Plaintiffs' request to appoint a special master because such relief is disfavored under Rule 53 of the Federal Rules of Civil Procedure. Individual Defendants join Local Defendants' argument that the Court lacks subject matter jurisdiction over Plaintiffs' IDEA claim because Plaintiffs have failed to exhaust their administrative remedies.

State Defendants join in the Local and Individual Defendants' Motions to Dismiss, and they make additional arguments in support of the Motions. First, they argue that the question of whether the most recent IEP determinations have offered Student a FAPE is a new question to be resolved by the SEHO at another due process hearing. State Defendants also argue that Plaintiffs have alleged numerous procedural violations surrounding parental participation in the IEP process, and that each alleged violation is subject to investigation under CDE's procedures. Plaintiffs, however, have not raised any of these violations in an administrative "compliance complaint." The SEHO hearing officer did not address these violations in her June 30, 1999, order; indeed, they had not occurred when the hearing officer issued the order.

Plaintiffs oppose all Defendants' Motions on several grounds. First, they argue that Local and Individual Defendants failed to comply with Local Rule 7.4.1 because both meetings were untimely. Plaintiffs also assert that Local Defendants failed to inform Plaintiffs' counsel that they intended to argue in their Motion that the IDEA is an exclusive remedy which preempts a § 1983 claim and that they would claim immunity under the Eleventh Amendment. Plaintiffs further argue that counsel for Individual

Defendants also failed to comply with Local Rule 7.4.1 because counsel failed to inform Plaintiffs' counsel that Individual Defendants' Motion would be based in part upon an argument that Plaintiffs are not entitled to the appointment of a special master. Second, Plaintiffs argue that Individual Defendants' Motion to Dismiss should be denied because the Motion was not filed timely. Individual Defendants filed their Motion one day late and without request for additional time in which to respond to the Complaint or explanation for the delay.[3]

Substantively, Plaintiffs argue that the IDEA is not the exclusive remedy precluding a § 1983 claim because Congress has said and case law has determined otherwise. Additionally, Plaintiffs' assert that their complaint is sufficient to defeat Individual Defendants' claims of qualified immunity because Plaintiffs alleged that Individual Defendants acted in bad faith and/or with intentional disregard for Student's constitutional rights. With respect to Eleventh Amendment immunity, Plaintiffs argue that Congress expressly abrogated States' Eleventh Amendment immunity in the IDEA and that such immunity does not preclude injunctive relief against Individual Defendants.

Plaintiffs make several arguments against Defendants' assertions that they are required to exhaust administrative remedies before coming to federal court. First, they argue that pursuing administrative remedies would

[3] Even if true, these infractions do not warrant denying Defendants' Motions.

be futile because Defendants have "previously demonstrated that they will not be bound by or comply with SEHO's orders," and Plaintiffs' prior requests for assistance from State Defendants have "fallen on deaf ears." Plaintiffs also argue that they never received any notice that they had to exhaust state compliance procedures before filing suit in federal court to compel compliance with SEHO's order. Second, Plaintiffs claim that they are excused from exhausting administrative remedies because any relief obtained would be inadequate: Monetary damages, which Plaintiffs seek under § 1983, are not available under IDEA or CDE compliance procedures, and SEHO cannot appoint a special master under Rule 53. Plaintiffs also oppose dismissal of their state law claims and Individual Defendants' motion to strike Plaintiffs' request for a Special Master.

B. Motion to Dismiss for Lack of Subject Matter Jurisdiction

Individual, Local, and State Defendants all argue that Plaintiffs' claims under the IDEA and § 1983 should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure because Plaintiffs have failed to exhaust administrative remedies before bringing these claims. State and Local Defendants also argue that dismissal is warranted because they are immune from suit under the Eleventh Amendment to the United States Constitution.

Federal courts are courts of limited jurisdiction. *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). The plaintiff bears the burden of establishing subject matter jurisdiction, and the court presumes lack of jurisdiction until the plaintiff

proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).

A motion to dismiss a case pursuant to Rule 12(b)(1) challenges a federal court's subject matter jurisdiction over the action. A 12(b)(1) motion is appropriate when plaintiff has failed to exhaust administrative remedies that are a prerequisite to plaintiff's suit. *See Honig v. Doe*, 484 U.S. 305, 326-27, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (failure to exhaust administrative remedies under the IDEA before bringing a civil action in federal court deprives the court of subject matter jurisdiction over the action); *see also* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil* § 1350 (2d ed.1990). A 12(b)(1) motion is also appropriate when plaintiff's claim is barred by sovereign immunity. Wright & Miller, *supra*, § 1350.

1. The IDEA and Exhaustion of Administrative Remedies

a. The IDEA

The IDEA requires state education agencies that receive federal funds to monitor the provision of education in the state and to ensure an adequate education for all children, including those with disabilities. The IDEA provides for substantial parental involvement in developing an appropriate program of education for disabled children. Parents, teachers, and school district representatives together determine what constitutes a "free appropriate public education" ("FAPE") for each disabled child. *See Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300

(9th Cir.1992). The end result is an individualized education program ("IEP"), one that is tailored to the child's unique needs. 20 U.S.C. § 1414(d); *Hoeft,* 967 F.2d at 1300.

Congress created a comprehensive system of procedural safeguards to ensure that parents have "'an opportunity for meaningful input into all decisions affecting their child's education.'" *Id.* (quoting *Honig v. Doe,* 484 U.S. 305, 311, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988)). For example, parents must be notified in writing of changes the school district proposes or refuses to make in their child's educational program. 20 U.S.C. § 1415(b)(3). The notice must contain a description of procedural rights available to parents for challenging the district's decision and an explanation of the reasons for the decision. *Id.* § 1415(c).

The IDEA requires that states guarantee parents the right to seek review of any decisions concerning their child's education that they consider inappropriate. *Hoeft,* 967 F.2d at 1300. This right includes an opportunity to bring complaints about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). The preliminary forum for complaints is an "impartial due process hearing" conducted by the local school district or state. *Id.* § 1415(f)(1). If the hearing is conducted by a local educational agency, an aggrieved party may appeal the decision to the state educational agency. *Id.* § 1415(g). A party not satisfied with the decision on appeal, or a party aggrieved by the decision under § 1415(f) who does not have the right to an appeal under subsection (g), may bring a civil action in state or federal court. *Id.* § 1415(i)(2)(A). California has adopted due process

procedures pursuant to these requirements. *See* Cal.Educ. Code § 56000 *et seq.*

b. Exhaustion of Administrative Remedies under the IDEA

Judicial review under the IDEA is ordinarily available only after the plaintiff exhausts administrative remedies. *See Doe v. Arizona Dep't of Educ.,* 111 F.3d 678, 680-81 (9th Cir.1997). "Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Hoeft,* 967 F.2d at 1303.

However, a plaintiff need not exhaust administrative remedies if it would be futile or offer inadequate relief, or if the agency has adopted a policy or pursued a practice of general applicability that is contrary to the law. *See Honig v. Doe,* 484 U.S. 305, 326-27, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988); *Hoeft,* 967 F.2d at 1303-04. The party alleging futility or inadequacy of IDEA procedures bears the burden of proof. *See Doe v. Arizona Dep't of Educ.,* 111 F.3d at 681.

The facts that Plaintiffs contend support their IDEA claim are facts that occurred after the hearing officer entered her order. The gravamen of this claim is that Defendants violated Plaintiffs' rights under the IDEA during the 1999-2000 school year. Thus, at the time the hearing officer issued her decision, these facts had not yet come into existence. The relief Plaintiffs request under

their IDEA claim is the appointment of a special master pursuant to Rule 53 of the Federal Rules of Civil Procedure. Plaintiffs argue that although the grant of such relief is the exception rather than the rule, it is relief that is not available under the IDEA; thus, requiring Plaintiffs to first exhaust administrative remedies to obtain the relief requested under this claim would not provide adequate relief.

A court appoints a special master under Rule 53 only to help the court in a case where help is needed, and the special master's appointment and activities are only for the purpose of assisting the court to get facts and arrive at the correct result in complicated litigation pending before the court. A special master has no wider scope of activity than the court itself. *See Webster Eisenlohr, Inc. v. Kalodner,* 145 F.2d 316, 319 (3d Cir.1944). The powers and authority with which Plaintiffs propose the Court vest an appointed special master are much broader than this Court's proper sphere of activity, especially considering the specialized nature of the subject matter at hand. Plaintiffs propose that a special master be vested with the powers and authority to, *inter alia,* "approve the IEP as developed, including, but not limited to: (a) the designation of related services to be provided by MBUSD or by a nonpublic agency (including, but not limited to, consultants expert in the areas of autism and curriculum modification) ...; and (b) the nature and extent of additional compensatory education (if any) required to compensate Student for past denials of a FAPE." *Complaint* ¶ 6.4.

Plaintiffs correctly state that the appointment of a special master is not available under the IDEA. However, the *type* of relief Plaintiffs seek is of a type that is available under a relevant administrative scheme: The broad

"watchdog" powers with which Plaintiffs propose a special master be vested are the type of procedural safeguards the IDEA contemplates in its remedial scheme. Therefore, resort to an administrative remedy would provide adequate relief.

To the extent that Plaintiffs seek enforcement of the June 30, 1999, SEHO order by bringing this IDEA claim, the Ninth Circuit has already determined that Title 5, Division 1, section 4650 of the California Code of Regulations provides the proper avenue by which to enforce SEHO orders.[4] *See Wyner v. Manhattan Beach Unified Sch. Dist.*, 223 F.3d 1026, 1029 (9th Cir.2000). Plaintiffs argue that this case did not make resort to this administrative remedy obligatory. Rather, the Court held that the SEHO lacked jurisdiction to hold due process hearings on compliance issues, and the Court merely stated that issues of non-compliance with an SEHO order *may* be brought before the Compliance Office of the California Department of Education pursuant to California Code of Regulations § 4650(a)(viii)(B). Plaintiffs may be technically correct; however, when viewed in light of the purpose of the exhaustion requirement, this avenue of administrative relief is preferable.[5]

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[4] This regulatory provision states that "the Superintendent shall directly intervene without waiting for local agency action if one or more of the following conditions exists . . . : The complainant alleges that the local educational agency fails or refuses to comply with the due process procedures established pursuant to federal and state law and regulations; or has failed or refused to implement a due process hearing order."

[5] As stated earlier, "Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state

(Continued on following page)

Plaintiffs' argument that they should be excused from exhausting administrative remedies before filing suit in federal court because Defendants failed to provide Plaintiffs with notice that Plaintiffs had to first exhaust their administrative remedies in accordance with the CDE's compliance procedures is without merit. Student's parents have been represented by counsel at least since October 1999. *See Complaint* ¶ 37. This Court finds persuasive a district court case from Michigan, in which the court held that the parents of a disabled child could not rely on the failure of education authorities to notify them of their right to a hearing under the Education of the Handicapped Act[6] to excuse them from the exhaustion requirement where the parents were aware of their rights and were represented by counsel who was completely familiar with the applicable provisions. *See Waterman by Waterman v. Marquette-Alger Intermediate Sch. Dist.*, 739 F.Supp. 361 (W.D.Mich.1990).

Furthermore, Plaintiffs' counsel indicated in his declaration that he sent to the CDE on March 10, 2000, a copy of a letter he originally sent to Local Defendants' counsel (dated March 6, 2000), in which he stated that his clients intended to file suit in federal district court to seek redress for MBUSD's failure to comply with the SEHO order. Plaintiffs' counsel also stated that a current IEP

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and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Hoeft*, 967 F.2d at 1303.

[6] Predecessor to the IDEA.

was not in place for the 1999-2000 school year, and that MBUSD was in violation of the IDEA by providing special education services without a current IEP. Plaintiffs' counsel explained that his clients would proceed directly to federal court because "'further attempt to exhaust administrative remedies would be pointless because the District does not intend to comply with SEHO's order, or IDEA.'" *Decl. of Steven Wyner* ¶ 11. The CDE acknowledged the receipt of a copy of this letter, and invited Plaintiffs' counsel to "'request direct state intervention' on an attached form entitled 'Request for Complaint Investigation.'" Plaintiffs' counsel did not complete or return this form because he believed that the copy of his letter to Local Defendants' counsel, which he sent to the CDE, satisfied the requirement for filing a complaint with the CDE under section 4600 *et seq.* of the California Code of Regulations.

Plaintiffs have not alleged specific facts showing that an investigation by the CDE of the matters referred to in Plaintiffs' counsel's March 6 letter would be an exercise in futility. Rather than follow the administrative enforcement scheme, Plaintiffs elected to bypass this route and proceed directly to federal court. This Court will not excuse Plaintiffs from the requirement of exhausting administrative remedies before bringing their IDEA claim to federal court. The Court therefore **DISMISSES** this claim **without prejudice** against all Defendants for failure to seek administrative enforcement of the SEHO order by the CDE.

2. Section 1983 Action for Violation of the IDEA

Section 1983 provides an avenue by which to redress the deprivation by a state agent of substantive rights secured under the Constitution or federal statutes. 42 U.S.C. § 1983. When the rights at issue are statutory, a § 1983 action is impermissible when Congress indicated its intent to preclude such private enforcement either in the express language of the statute or where the statutory remedial scheme is so comprehensive that an intent to prohibit enforcement other than by the statute's own means may be inferred. *See Wright v. Roanoke Redevelopment & Hous. Auth.,* 479 U.S. 418, 423, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987).

a. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State.

U.S. Const., amend. XI.

The Eleventh Amendment embodies the principle of sovereign immunity, and thus bars a federal court from hearing claims by individuals against dependent instrumentalities of the state, their agencies, or the officials of those agencies unless the State consents to suit, or Congress has expressly abrogated the State's immunity. *See Seminole Tribe v. Florida,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Hafer v. Melo,* 502 U.S. 21, 112 S.Ct.

358, 116 L.Ed.2d 301 (1991); *Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). A state is not a "person" within the meaning of 42 U.S.C. § 1983 and therefore may not properly be named as a defendant in a § 1983 action. *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). This principle extends to state agencies and to state officers named in their official capacities. *See id.; Emma C. v. Eastin,* 985 F.Supp. 940, 946 (N.D.Cal.1997).

As dependent instrumentalities of the state, school districts are within the purview of the Eleventh Amendment. *Belanger v. Madera Unified Sch. Dist.,* 963 F.2d 248, 251 (9th Cir.1992).

The Eleventh Amendment does not, however, bar a federal court from granting prospective injunctive relief against an officer of the state who acts outside the bounds of his authority, *Cerrato v. San Francisco Cmty. Coll. Dist.,* 26 F.3d 968, 973 (9th Cir.1994), or against state officers sued in their individual capacities, *id.; Doe v. Lawrence Livermore Nat'l Lab.,* 131 F.3d 836, 839 (9th Cir.1997). This is the "stripping doctrine" of *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). This doctrine applies only where the state officials are allegedly violating federal law; it does not reach suits seeking relief against state officials for violations of state law. *See Pennhurst,* 465 U.S. at 106, 104 S.Ct. 900.

Plaintiffs' § 1983 claim must be dismissed in its entirety against the CDE and the California Board of Education because both entities are state agencies and therefore cloaked by Eleventh Amendment immunity. As California's State Superintendent of Public Instruction,

Delaine Eastin enjoys Eleventh Amendment immunity from suit, even when sued only in her official capacity. *See Eaglesmith v. Ward,* 73 F.3d 857, 860 (9th Cir.1995) (holding that superintendent was state agent entitled to Eleventh Amendment immunity). Thus, Plaintiffs' § 1983 claim is also dismissed against Defendant Eastin.

Additionally, dismissal of this claim against MBUSD is warranted because as a school district, MBUSD is an arm of the state entitled to sovereign immunity. *Belanger,* 963 F.2d at 254. As the governing body of MBUSD, the Board of Trustees is also an arm of the state and enjoys Eleventh Amendment immunity from Plaintiffs' § 1983 claim. In their Supplemental Opposition, Plaintiffs concede that they cannot maintain a § 1983 cause of action against MBUSD or its Board of Trustees. *See Pl.s' Supp.Mem.P. & A.* at 5.

Plaintiffs have sued Individual Defendants both in their official and individual capacities under § 1983 for retrospective and prospective relief. As school district officials, Individual Defendants are "state" officials and thus are "persons" within the meaning of [§] 1983. The Eleventh Amendment does not bar Plaintiffs' 1983 claim against Individual Defendants.

Plaintiffs' § 1983 claim against State and Local Defendants is barred by the Eleventh Amendment and hereby **DISMISSED with prejudice** pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

b. Exhaustion of Administrative Remedies

Although the Eleventh Amendment does not bar Plaintiffs from asserting a § 1983 claim against Individual Defendants for alleged IDEA violations, it is not automatic that the Court has subject matter jurisdiction over the claim. There is a split of authority as to whether a plaintiff must exhaust administrative remedies under the IDEA before bringing an IDEA-based § 1983 action. The IDEA, as amended by Congress, states that the statute's provisions are not the sole means for redress available to disabled children and their parents. 20 U.S.C. § 1415(*l*).[7] The statute requires, however, that a plaintiff exhaust administrative remedies before bringing a civil action under another federal law when the plaintiff seeks relief that is also available under the IDEA: "[T]he procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." *Id.*

The minority approach, adopted by the Third Circuit, reasons that the converse of the plain language in § 1415(*l*) does not require exhaustion where a plaintiff seeks relief that is not available under the IDEA. This is because the administrative pursuit of a remedy not available under the IDEA would render exhaustion futile. *See W.B. v. Matula,* 67 F.3d 484, 496 (3d Cir.1995).

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[7] 20 U.S.C. § 1415(*l*) states:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, . . . , or other Federal laws protecting the rights of children with disabilities. . . .

The majority approach, adopted by the Tenth Circuit, requires a plaintiff to exhaust administrative remedies despite the plaintiff's contemporaneous assertion of a § 1983 claim for damages. *See Doe v. Alfred,* 906 F.Supp. 1092, 1098 (S.D.W.Va.1995).

Although the Ninth Circuit has not explicitly adopted either approach, language in a recent Ninth Circuit opinion seems to suggest that the Ninth Circuit favors the minority approach. In *Witte v. Clark County Sch. Dist.,* 197 F.3d 1271 (9th Cir.1999), a disabled student brought an action under the IDEA in federal court against the school district and various school district officials for monetary damages associated with physical injuries school officials inflicted upon him. The court concluded that because the plaintiff only sought retrospective monetary damages, "which is not 'relief that is available under' the IDEA, and because all educational issues already have been resolved to the parties' mutual satisfaction through the IEP process, Plaintiff is not 'seeking relief that is also available' under the IDEA [citation omitted]. That being so, under the *plain words of the statute,* exhaustion of administrative remedies is not required." *Id.* at 1275 (citing *W.B. v. Matula,* 67 F.3d 484, 495 (3d Cir.1995)) (emphasis added).

A district court case from this district explicitly adopted the minority approach as set forth by the Third Circuit in *W.B. v. Matula,* but limited its holding to situations in which there is *no* administrative remedy for the wrong suffered. In *Plasencia v. State of California,* 29 F.Supp.2d 1145 (C.D.Cal.1998), a ward brought an action in federal court to challenge conditions of confinement. The plaintiff asserted various claims, including a claim for damages under § 1983 for alleged violations of the IDEA.

The court acknowledged the Third Circuit's "plain language" approach to the exhaustion requirement in § 1983 suits for damages premised upon IDEA violations, but noted that the rationale for the Third Circuit's decision sanctioned waiver of exhaustion of administrative remedies only where there is *no* administrative remedy for a wrong that the plaintiff has suffered. *Plasencia,* 29 F.Supp.2d at 1150.[8]

In the case at bar, Plaintiffs seek various forms of relief for their § 1983 claim, including money damages against Individual Defendants, declaratory and injunctive relief against all Defendants, compensatory damages against Local Defendants limited to reimbursement of up to sixteen weeks of private instruction Student has received (at a rate of $1300 per week) and reimbursement of all costs incurred to transport Student daily to and from the offices where he receives private instruction (from Manhattan Beach to Rolling Hills Estates). Plaintiffs also

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[8] In *Matula,* the Third Circuit excused the plaintiffs from the exhaustion requirement because the parties in that case were bound by their settlement agreement, which provided for rights available to the plaintiffs under the IDEA. *Matula,* 67 F.3d at 496. The Third Circuit further stated that waiver of the exhaustion requirement would also be permitted where the parents of a deceased child seek damages for a school board's failure to provide IDEA services to the child while the child was still alive. *Id.* In both of these situations, the plaintiffs have no administrative remedy for the alleged wrong. The court noted that such narrow exceptions to the general exhaustion requirement would be "rare indeed"; thus, as the *Plasencia* court remarked, exhaustion cannot be waived whenever a plaintiff seeks monetary damages under § 1983 for alleged IDEA violations because there might exist other administrative remedies available to the plaintiff directly under the IDEA. *Plasencia,* 29 F.Supp.2d at 1150.

seek compensatory education related to Student's socialization deficits; specifically, they request the Court to order Local Defendants to provide Student with an additional year of social skills modeling and instruction by a nonpublic agency. *Complaint* ¶¶ 1-5.2.

In their Opposition, Plaintiffs contend that resorting to administrative remedies for their § 1983 claim would offer inadequate relief because the money damages Plaintiffs seek under § 1983 are not available under the IDEA or CDE compliance procedures. On this basis, Plaintiffs claim they are excused from exhausting administrative remedies before pursuing a § 1983 claim to enforce the SEHO's order.

With the exception of the request for monetary damages against the Individual Defendants, the other forms of relief Plaintiffs seek under § 1983 are available under the IDEA and the CDE has authority to fashion such relief.[9] Although monetary damages are arguably not available under the IDEA,[10] the Court finds the rationale of *Plasencia* persuasive. Plaintiffs have requested other forms of

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[9] That is, the CDE may order the declaratory and injunctive relief Plaintiffs seek, it may authorize reimbursement for expenses incurred for Student's private instruction, and it may fashion compensatory education for Student. *See* 5 C.C.R. § 4600 *et seq.*

[10] At least one court has concluded that compensatory damages are available in direct IDEA actions. *See Emma C. v. Eastin*, 985 F.Supp. 940, 945 (N.D.Cal.1997). Other courts have stated that monetary damages are not available in such actions because they are not provided for in the IDEA, itself, and the hearing officer lacks the authority to grant such relief. *See, e.g., Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, (9th Cir.1999) (noting that monetary damages are not available in IDEA administrative proceedings); *W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir.1995) (same).

relief for their § 1983 claim that are available under the administrative scheme of the IDEA; thus, it is not the case that Plaintiffs here have no administrative remedy. Moreover, were the Court to conclude that Plaintiffs may bring a § 1983 claim in this Court based on the unavailability of monetary damages in an administrative proceeding, plaintiffs could routinely circumvent exhaustion requirements by simply asserting an IDEA-based § 1983 claim for damages in similar cases.

Plaintiffs must exhaust administrative remedies before coming to this Court to assert their § 1983 cause of action. Accordingly, Plaintiffs' § 1983 claim against Individual Defendants is hereby **DISMISSED without prejudice** under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction.

3. State Law Claims

With the dismissal of Plaintiffs' IDEA and § 1983 claims, there remains no jurisdictional basis to which Plaintiffs' state law claims can attach. Therefore, the Court hereby **DISMISSES** each of Plaintiffs' state law claims.

V. CONCLUSION

Plaintiffs have not exhausted their administrative remedies before filing this action. Furthermore, they have not shown that pursuit of administrative remedies to redress the alleged wrongs would be inadequate or futile. The supervisorial role that a Special Master would play is the type of relief that the IDEA contemplates in its comprehensive administrative scheme and that the CDE provides in the regulatory scheme set forth in California

Education Code section 56000 *et seq.* and in Title 5, Division 1 of the California Code of Regulations.

Second, the exhaustion requirement of the IDEA is not waived simply by virtue of asserting a claim for monetary damages under 42 U.S.C. § 1983 based on the alleged IDEA violation. Although monetary damages are not available in IDEA administrative proceedings, Plaintiffs have included in their Prayer additional forms of relief that are available under the IDEA's administrative remedial scheme. Thus, Plaintiffs must exhaust their administrative remedies before asserting a § 1983 action in this Court.

Finally, State and Local Defendants enjoy Eleventh Amendment immunity from Plaintiffs' § 1983 cause of action.

The Court lacks subject matter jurisdiction over the instant action. Accordingly, the Court hereby **GRANTS** Defendants' Motions to Dismiss:

1. Plaintiffs' cause of action under the IDEA is hereby **DISMISSED without prejudice** as against all Defendants pursuant to Rule 12(b)(1) for failure to exhaust administrative remedies.

2. Plaintiffs' claim under 42 U.S.C. § 1983 is hereby **DISMISSED with prejudice** as against State and Local Defendants based on their immunity under the Eleventh Amendment.

3. Plaintiffs' claim under 42 U.S.C. § 1983 is hereby **DISMISSED without prejudice** as against Individual Defendants pursuant to Rule 12(b)(1) for failure to exhaust administrative remedies.

4. Plaintiffs' state law claims are hereby **DISMISSED** in their entirety for lack of subject matter jurisdiction.

IT IS SO ORDERED.

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20 U.S.C. Sec. 1415. – Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include –

(1)

an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(2)

procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in

the education or care of the child) to act as a surrogate for the parents;

(3)

written prior notice to the parents of the child whenever such agency –

(A)

proposes to initiate or change; or

(B)

refuses to initiate or change;

the identification, evaluation, or educational placement of the child, in accordance with subsection (c) of this section, or the provision of a free appropriate public education to the child;

(4)

procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

(5)

an opportunity for mediation in accordance with subsection (e) of this section;

(6)

an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

(7)

procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential) –

(A)

to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

(B)

that shall include –

(i)

the name of the child, the address of the residence of the child, and the name of the school the child is attending;

(ii)

a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(iii)

a proposed resolution of the problem to the extent known and available to the parents at the time; and

(8)

procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

(c) Content of prior written notice

The notice required by subsection (b)(3) of this section shall include –

(1)

a description of the action proposed or refused by the agency;

(2)

an explanation of why the agency proposes or refuses to take the action;

(3)

a description of any other options that the agency considered and the reasons why those options were rejected;

(4)

a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

(5)

a description of any other factors that are relevant to the agency's proposal or refusal;

(6)

a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

(7)

sources for parents to contact to obtain assistance in understanding the provisions of this subchapter.

(d) Procedural safeguards notice

(1) In general

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum –

(A)

upon initial referral for evaluation;

(B)

upon each notification of an individualized education program meeting and upon reevaluation of the child; and

(C)

upon registration of a complaint under subsection (b)(6) of this section.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to –

(A)

independent educational evaluation;

(B)

prior written notice;

(C)

parental consent;

(D)

access to educational records;

(E)

opportunity to present complaints;

(F)

the child's placement during pendency of due process proceedings;

(G)

procedures for students who are subject to placement in an interim alternative educational setting;

(H)

requirements for unilateral placement by parents of children in private schools at public expense;

(I)

mediation;

(J)

due process hearings, including requirements for disclosure of evaluation results and recommendations;

(K)

State-level appeals (if applicable in that State);

(L)

civil actions; and

(M)

attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) of this section to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k) of this section.

(2) Requirements

Such procedures shall meet the following requirements:

(A)

The procedures shall ensure that the mediation process –

(i)

is voluntary on the part of the parties;

(ii)

is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this section, or to deny any other rights afforded under this subchapter; and

(iii)

is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B)

A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with –

(i)

a parent training and information center or community parent resource center in the State established under section *1482* or *1483* of this title; or

(ii)

an appropriate alternative dispute resolution entity;

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C)

The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D)

The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E)

Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F)

An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

(G)

Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.

(f) Impartial due process hearing

(1) In general

Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(2) Disclosure of evaluations and recommendations

(A) In general

At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the

relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitation on conduct of hearing

A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational agency or the

local educational agency involved in the education or care of the child.

(g) Appeal

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded –

(1)

the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2)

the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3)

the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4)

the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section *1417*(c) of title (relating to the confidentiality of data, information, and records) and shall also be transmitted to the advisory panel established pursuant to section *1412* (a)(21) of this title).

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

(B) Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this

section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(B) Additional requirements

In any action brought under this paragraph, the court –

(i)

shall receive the records of the administrative proceedings;

(ii)

shall hear additional evidence at the request of a party; and

(iii)

basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees end related costs for certain services

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if –

(I)

the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II)

the offer is not accepted within 10 days; and

(III)

the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii)

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that –

(i)

the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii)

the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii)

the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv)

the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7) of this section;

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(7) of this section, during the pendency of any

proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A)

School personnel under this section may order a change in the placement of a child with a disability –

(i)

to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

(ii)

to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if –

(I)

the child carries or possesses a weapon to or at school, on school premises, or to

or at a school function under the jurisdiction of a State or a local educational agency; or

(II)

the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of a State or local educational agency.

(B)

Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A) –

if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

(ii)

if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

(2) Authority of hearing officer

A hearing officer under this section may order a change in the placement of a child with

a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer

(A)

determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

(B)

considers the appropriateness of the child's current placement;

(C)

considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

(D)

determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

(3) Determination of setting

(A) In general

The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

(B) Additional requirements

Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall –

(i)

be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

(ii)

include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

(4) Manifestation determination review

(A) In general

If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated any rule or code of conduct of the local educational agency that applies to all children –

(i)

not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and

(ii)

immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

(B) Individuals to carry out review

A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

(C) Conduct of review

In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team –

(i)

first considers, in terms of the behavior subject to disciplinary action, all relevant information, including –

(I)

evaluation and diagnostic results, including such results or other relevant

information supplied by the parents of the child; –

(II)

observations of the child; and

(III)

the child's IEP and placement; and

(ii)

then determines that –

(I)

in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

(II)

the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

(III)

the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

(5) Determination that behavior was not manifestation of disability

(A) In general

If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section *1412*(a)(1) of this title.

(B) Additional requirement

If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

(6) Parent appeal

(A) In general

(i)

If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

(ii)

The State or local educational agency shall arrange for an expedited hearing in

any case described in this subsection when requested by a parent.

(B) Review of decision

(i)

In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

(ii)

In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

(7) Placement during appeals

(A) In general

When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

(B) Current placement

If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

(C) Expedited hearing

(i)

If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

(ii)

In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

(B) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if –

the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

(ii)

the behavior or performance of the child demonstrates the need for such services;

(iii)

the parent of the child has requested an evaluation of the child pursuant to section *1414* of this title; or

(iv)

the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

(C) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation

conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(9) Referral to and action by law enforcement and judicial authorities

(A)

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial

authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B)

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

(10) Definitions

For purposes of this subsection, the following definitions apply:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (*21* U.S.C. *812*(c)).

(B) Illegal drug

The term "illegal drug" –

(i)

means a controlled substance; but

(ii)

does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act (*21* U.S.C. *801* et seq.) or under any other provision of Federal law.

(C) Substantial evidence

The term "substantial evidence" means beyond a preponderance of the evidence.

(D) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section *930* of title *18*.

(l) Rule of construction

Nothing in this chapter shall be construed to restrict or

limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 (*42* U.S.C. *12101* et seq.), title V of the Rehabilitation Act of 1973 (*29* U.S.C. *790* et seq.), or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) –

(A)

the public agency shall provide any notice required by this section to both the individual and the parents;

(B)

all other rights accorded to parents under this subchapter transfer to the child;

(C)

the agency shall notify the individual and the parents of the transfer of rights; and

(D)

all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under state law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.